

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH HENRY RICHMIRE,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of the Social Security Administration,

Defendant.

CASE NO. 12-cv-05037

REPORT AND
RECOMMENDATION ON
PLAINTIFF'S COMPLAINT

Noting Date: November 30, 2012

This matter has been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261, 271-72 (1976). This matter has been fully briefed (*see* ECF Nos. 11, 14, 15).

Regarding the medical evidence provided by examining doctor, Dr. Peterson, the ALJ failed to provide specific and legitimate reasons to discount this medical opinion evidence. For this reason, and because this error affected the ultimate disability decision,

1 this matter should be reversed and remanded pursuant to sentence four of 42 U.S.C. §
2 405(g) to the Administration for further proceedings.

3 BACKGROUND

4 Plaintiff, JOSEPH HENRY RICHMIRE, was nineteen years old on his alleged
5 disability onset date of February 1, 2007 and twenty-two years old on the date of the
6 ALJ's written decision (*see* Tr. 23, 117, 121). Plaintiff has never lived away from a
7 parent (Tr. 336). Although plaintiff dropped out of high school, he reported being
8 enrolled in a mail order program to receive his high school diploma (Tr. 337). He has no
9 relevant past relevant work experience and has reported never having a job (*id.*; *see also*
10 Tr. 22). His activities of daily living include getting up between 9 am and noon; feeding
11 his guinea pig; studying on-line high school courses; and watching TV (Tr. 337).
12

13 Having weight "recorded as ranging from about 450 pounds to as high as 629
14 pounds with his height listed as 77 inches" (Tr. 14), plaintiff is morbidly obese; he
15 reports having been obese all of his life (*see* Tr. 337); and has had surgery recommended
16 (*see* Tr. 19). In addition to obesity, plaintiff also suffers from the severe impairments of
17 sleep apnea; hypertension; depression; and social anxiety disorder, generalized (*see id.*).
18

19 PROCEDURAL HISTORY

20 Plaintiff filed an application for Social Security Income and Child's Insurance
21 Benefits (*see* Tr. 12, 111-22). His applications were denied initially and following
22 reconsideration (*see* Tr. 65-79). His requested hearing was held before Administrative
23 Law Judge M.J. Adams ("the ALJ") on March 15, 2010 (Tr. 30-51, 80-82). On April 22,
24

1 2010, the ALJ issued a written decision in which he found that plaintiff was not disabled
2 pursuant to the Social Security Act (Tr. 9-23).

3 On November 22, 2011, the Appeals Council denied plaintiff's request for review,
4 making the written decision by the ALJ the final agency decision subject to judicial
5 review (Tr. 1-6). *See* 20 C.F.R. § 404.981. On January 16, 2012, plaintiff filed a
6 complaint in this Court, seeking judicial review of the ALJ's written decision (*see* ECF
7 No. 1). Defendant filed the sealed administrative transcript regarding this matter ("Tr.")
8 on March 27, 2012 (*see* ECF Nos. 8, 9). In his Opening Brief, plaintiff raises one specific
9 issue: whether or not the ALJ committed harmful legal error in his evaluation of the
10 opinion of Dr. J. Keith Peterson, Ph.D. ("Dr. Peterson"), who is an examining doctor (*see*
11 ECF No. 11, p. 1).

13 STANDARD OF REVIEW

14 Plaintiff bears the burden of proving disability within the meaning of the Social
15 Security Act (hereinafter "the Act"); although the burden shifts to the Commissioner on
16 the fifth and final step of the sequential disability evaluation process. *Meanel v. Apfel*,
17 172 F.3d 1111, 1113 (9th Cir. 1999); *see also Johnson v. Shalala*, 60 F.3d 1428, 1432
18 (9th Cir. 1995); *Bowen v. Yuckert*, 482 U.S. 137, 140, 146 n. 5 (1987). The Act defines
19 disability as the "inability to engage in any substantial gainful activity" due to a physical
20 or mental impairment "which can be expected to result in death or which has lasted, or
21 can be expected to last for a continuous period of not less than twelve months." 42 U.S.C.
22 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff's
23 impairments are of such severity that plaintiff is unable to do previous work, and cannot,
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1 considering the plaintiff's age, education, and work experience, engage in any other
2 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
3 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

4 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
5 denial of social security benefits if the ALJ's findings are based on legal error or not
6 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
7 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
8 1999)). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
9 such "relevant evidence as a reasonable mind might accept as adequate to support a
10 conclusion." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v.*
11 *Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)); *see also Richardson v. Perales*, 402 U.S.
12 389, 401 (1971). Regarding the question of whether or not substantial evidence supports
13 the findings by the ALJ, the Court should "review the administrative record as a whole,
14 weighing both the evidence that supports and that which detracts from the ALJ's
15 conclusion." *Sandgathe v. Chater*, 108 F.3d 978, 980 (1996) (per curiam) (*quoting*
16 *Andrews, supra*, 53 F.3d at 1039). In addition, the Court "must independently determine
17 whether the Commissioner's decision is (1) free of legal error and (2) is supported by
18 substantial evidence." *See Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing*
19 *Moore v. Comm'r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)); *Smolen v.*
20 *Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

21
22
23 According to the Ninth Circuit, "[l]ong-standing principles of administrative law
24 require us to review the ALJ's decision based on the reasoning and actual findings

1 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the
 2 adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1226-27
 3 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation
 4 omitted)); *see also Molina v. Astrue*, 674 F.3d 1104, 1121, 2012 U.S. App. LEXIS 6570
 5 at *42 (9th Cir. April 2, 2012) (Dock. No. 10-16578); *Stout v. Commissioner of Soc. Sec.*,
 6 454 F.3d 1050, 1054 (9th Cir. 2006) (“we cannot affirm the decision of an agency on a
 7 ground that the agency did not invoke in making its decision”) (citations omitted). In the
 8 context of social security appeals, legal errors committed by the ALJ may be considered
 9 harmless where the error is irrelevant to the ultimate disability conclusion when
 10 considering the record as a whole. *Molina, supra*, 674 F.3d 1104, 1115-16, 1117-19,
 11 11121-22, 2012 U.S. App. LEXIS 6570 at *24-*26, *32-*36, *45-*46; *see also* 28
 12 U.S.C. § 2111; *Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009); *Stout, supra*, 454 F.3d at
 13 1054-55.
 14

15 DISCUSSION

16 The ALJ committed harmful legal error in his evaluation of the opinion of
 17 examining doctor, Dr. J. Keith Peterson, Ph.D. (“Dr. Peterson”).

18 The ALJ must provide “clear and convincing” reasons for rejecting the
 19 uncontradicted opinion of either a treating or examining physician or psychologist.
 20 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (*citing Baxter v. Sullivan*, 923 F.2d
 21 1391, 1396 (9th Cir. 1991); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). Even if
 22 a treating or examining physician’s opinion is contradicted, that opinion “can only be
 23 rejected for specific and legitimate reasons that are supported by substantial evidence in
 24

1 the record.” *Lester, supra*, 81 F.3d at 830-31 (*citing Andrews v. Shalala*, 53 F.3d 1035,
2 1043 (9th Cir. 1995)). The ALJ can accomplish this by “setting out a detailed and
3 thorough summary of the facts and conflicting clinical evidence, stating his interpretation
4 thereof, and making findings.” *Reddick, supra*, 157 F.3d at 725 (*citing Magallanes v.*
5 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

6 In addition, the ALJ must explain why his own interpretations, rather than those of
7 the doctors, are correct. *Reddick, supra*, 157 F.3d at 725 (*citing Embrey v. Bowen*, 849
8 F.2d 418, 421-22 (9th Cir. 1988)). However, the ALJ “need not discuss *all* evidence
9 presented.” *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir.
10 1984) (per curiam). The ALJ must only explain why “significant probative evidence has
11 been rejected.” *Id.* (*quoting Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981)).

13 An examining physician’s opinion is “entitled to greater weight than the opinion
14 of a nonexamining physician.” *Lester, supra*, 81 F.3d at 830 (citations omitted); *see also*
15 20 C.F.R. § 404.1527(d). A non-examining physician’s or psychologist’s opinion may
16 not constitute substantial evidence by itself sufficient to justify the rejection of an opinion
17 by an examining physician or psychologist. *Lester, supra*, 81 F.3d at 831 (citations
18 omitted). However, “it may constitute substantial evidence when it is consistent with
19 other independent evidence in the record.” *Tonapetyan, supra*, 242 F.3d at 1149 (*citing*
20 *Magallanes, supra*, 881 F.2d at 752).

21 According to Social Security Ruling (“SSR”) 96-8p, a residual functional capacity
22 assessment by the ALJ “must always consider and address medical source opinions. If the
23

1 RFC assessment conflicts with an opinion from a medical source, the adjudicator must
2 explain why the opinion was not adopted.” SSR 96-8p, 1996 SSR LEXIS 5 at *20.

3 Dr. Peterson examined and evaluated plaintiff on June 20, 2008 (*see* Tr. 336-341).
4 He conducted a mental status examination (“MSE”); diagnostic interview; Weschler
5 Memory Scale, third edition (“WMS-III”); and trail making test (*see* Tr. 336). Dr.
6 Peterson noted plaintiff’s report that he had never previously seen a mental health
7 professional (*see* Tr. 337).

8 Dr. Peterson assessed that plaintiff demonstrated “adequate stamina as we were
9 able to complete the examination without breaks,” although he also assessed that plaintiff
10 was experiencing anxiety and distress (Tr. 338). As assessed by Dr. Peterson, “[i]n short,
11 [plaintiff] appeared to be enduring our time together with difficulty [and] [h]is range of
12 affect was thus quite minimal” (*see id.*). Dr. Peterson noted that plaintiff’s affect “was
13 persistently negative, grim, and almost hostile,” and also noted that plaintiff assured him
14 that he would not have attended the evaluation, “even though he understood the benefit of
15 the appointment,” if his father had not made him do so (*id.*).

17 Dr. Peterson observed that plaintiff demonstrated adequate short term memory, but
18 that plaintiff’s memory for items “after a two minute interference task was only 33%”
19 (Tr. 338). Plaintiff’s working memory ability was at the third percentile (*id.*). Dr.
20 Peterson “guessed [plaintiff’s] receptive and expressive vocabulary to be average to
21 below average” (*id.*). Dr. Peterson assessed an articulation disorder (*id.*).

23 Dr. Peterson observed that plaintiff was able to perform all three steps, when given
24 a three-step instruction; however, he opined that plaintiff’s “emotional upset impacted his

1 focusing ability” (Tr. 339). Dr. Peterson explained the basis for his opinion: Plaintiff
2 “seemed to struggle with staying on task and dealing with his inner experience of upset”
3 (*id.*).

4 Dr. Peterson opined that plaintiff’s “insight and judgment seemed quite impaired”
5 (*id.*). Dr. Peterson gave a number of examples, such as that when he asked plaintiff “what
6 he would do if he was the first person in the theater to smell smoke, he stated ‘look
7 around’” (*id.*). Dr. Peterson opined that this response “is consistent with the passivity that
8 is part of his malaise” (*id.*).

9
10 Regarding plaintiff’s attitude and general behavior, Dr. Peterson opined as
11 follows:

12 I detected to (sic) evidence of malingering. However, the claimant had a
13 rather pronounced ‘worst case scenario’ about seemingly every topic we
14 discussed. He had a pessimistic and hopeless view of the future, and this
impacted his description of his symptoms.

15 (Tr. 338).

16 Dr. Peterson also indicated that plaintiff ‘was upset about the social nature of our
17 interview, and this seemed to effect his focusing” (Tr. 339). He indicated his opinion that
18 plaintiff’s results therefore likely were a low estimate of plaintiff’s cognitive ability (*see*
19 *id.*).

20 Dr. Peterson reported the objective results of plaintiff’s memory subtests and the
21 trail making tests (*see* Tr. 340). He indicated that plaintiff “displayed mild but definite
22 deficits on the [Wechsler Memory Scale, memory tests]” (*id.*). Although plaintiff was
23 skilled at memorizing word pairs, he “had more difficulty retaining this information over
24

1 time” (*id.*). Dr. Peterson indicated that plaintiff’s “working memory was low,” and that
2 plaintiff “showed signs of impulsivity and cognitive rigidity on the Trails test” (*id.*).

3 Dr. Peterson diagnosed plaintiff with major depression, chronic; social anxiety
4 disorder, generalized; phonological disorder; and psychological factors affecting physical
5 condition (obesity), among other diagnoses (*see id.*). Dr. Peterson also indicated that
6 plaintiff was receiving no mental health care and had minimal social support (*see id.*). He
7 assigned a global assessment of functioning (“GAF”) of 45 (Tr. 341).
8

9 For his summary and prognosis, Dr. Peterson indicated as follows:

10 This young man has an entrenched and severe pattern of depression,
11 poor eating habits, and morbid obesity. He appears to be waiting for his
12 depression to lift, and given the positive feedback loop between his
13 depression, eating patterns, and social anxiety this constellation of
14 symptoms is very likely to be chronic. It is likely that his depression is
15 impacting his cognitive ability, as measured by these two tests. He had
16 focusing problems, although his stamina was adequate in this setting. He
17 was able to perform simple and more complex instructions. His short
18 term and working memory appeared to be low.

19 This claimant will be challenged when it comes to working. From a
20 cognitive standpoint he should be able to perform a very basic entry-
21 level position. He should also be able to enter some type of rather basic
22 vocational training. From a physical standpoint, he will have challenges
23 due to his obesity. His depression is also a major hindrance.

24 Overall, I would say that the probability of this claimant finding and
keeping viable employment right now is marginal to poor. This
probability would improve to fair if his depression were successfully
treated.

(Tr. 341).

1 The ALJ provided a relatively thorough discussion of the report of Dr. Peterson
2 (*see* Tr. 20-21). However, he included the following regarding the weight he gave to Dr.
3 Peterson's opinions:

4 I weigh the portion of the assessment heavily that found a fairly
5 unremarkable mental status examination, showing the claimant could
6 perform at least simple tasks because this is supported by the record and
7 the State evaluations. However, his comment that the claimant's ability
8 to find and keep employment was marginal to poor is given less weight
9 because he felt that the claimant could be malingering. Furthermore, the
10 claimant admitted that he had never sought mental health treatment and
11 Dr. Peterson thought the claimant's condition would improve with
12 treatment, to the point that he could work.

13 (Tr. 21).

14 First, the Court concludes that the ALJ's summary of the results of plaintiff's
15 mental status examination from Dr. Peterson as "fairly unremarkable, showing the
16 claimant could perform at least simple tasks" (*see id.*) is not a finding based on
17 substantial evidence in the record as a whole. *See Magallanes, supra*, 881 F.2d at 750
18 ("Substantial evidence" is more than a scintilla, less than a preponderance, and is such
19 "relevant evidence as a reasonable mind might accept as adequate to support a
20 conclusion"). There were many findings in plaintiff's mental status examination that
21 were remarkable, including plaintiff's "poor working memory," and the fact that
22 plaintiff's memory for items "after a two minute interference task was only 33%" (*see* Tr.
23 338, 341). In addition, the ALJ indicated that Dr. Peterson's assessment demonstrated
24 that plaintiff "could perform at least simple tasks;" but, this finding by the ALJ is
misleading. Although Dr. Peterson's report indicated that plaintiff was able to perform all
three steps, when given a three-step instruction; he qualified that finding, as already

1 mentioned, with his opinion that plaintiff's "emotional upset impacted his focusing
2 ability" (*see* Tr. 339). Dr. Peterson explained the basis for his opinion: Plaintiff "seemed
3 to struggle with staying on task and dealing with his inner experience of upset" (*id.*).

4 In addition, the Court finds that the ALJ erred in his evaluation of Dr. Peterson's
5 report when he indicated that Dr. Peterson "felt that the claimant could be malingering" (*see*
6 Tr. 21). The relevant section already has been identified, *see supra*, and it is clear that Dr.
7 Peterson was indicating that there was no evidence of malingering: "I detected to (sic)
8 evidence of malingering. However, the claimant had a rather pronounced 'worst case
9 scenario' about seemingly every topic we discussed" (*see* Tr. 338). This interpretation is
10 buttressed by Dr. Peterson's report as a whole, and this mistake by the ALJ suggests that the
11 ALJ misinterpreted Dr. Peterson's entire report. For example, Dr. Peterson included in his
12 summary conclusions that it was "likely that his depression is impacting his cognitive
13 ability" and that plaintiff suffered from passive malaise (*see* Tr. 339, 341). There was no
14 indication in his summary or his diagnoses that Dr. Peterson opined that plaintiff was
15 malingering.
16

17 Based on the relevant record, the Court concludes that the ALJ's finding that Dr.
18 Peterson opined that plaintiff could have been malingering is not a finding based on
19 substantial evidence in the record as a whole. *See Magallanes, supra*, 881 F.2d at 750.
20 Furthermore, this finding by the ALJ is so wholly at odds with the entirety of the report by
21 Dr. Peterson that it demonstrates that the ALJ did not understand Dr. Peterson's report and
22 demonstrates that Dr. Peterson's opinions were not evaluated properly.
23
24

1 The Court also notes that the fact that plaintiff had not sought mental health treatment
2 does not demonstrate any flaw with Dr. Peterson's assessments or reasoning, as the ALJ has
3 not explained his apparent inference that a claimant who does not seek out mental health
4 treatment must therefore not have any functional limitations on his ability to work. Although
5 a lack of adherence generally with prescribed treatment may call into question a Social
6 Security claimant's credibility regarding the severity of the alleged symptoms and
7 impairments, *see* 20 C.F.R. § 404.1530; SSR 96-7 1996 SSR LEXIS 4, at *21-*22, a person
8 suffering from a mental illness may not realize that he needs his medication, or he may not
9 even realize that his "condition reflects a potentially serious mental illness." *See Van*
10 *Nguyen, supra*, 100 F.3d at 1465. When a person suffers from a mental illness, and the
11 mentally ill person does not have the requisite insight into his condition to seek treatment,
12 this fact actually can indicate a greater severity of mental incapacity. *See Van Nguyen, supra*,
13 100 F.3d at 1465; (*citing Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir. 1989) ("it is a
14 questionable practice to chastise one with a mental impairment for the exercise of poor
15 judgment in seeking rehabilitation."))).

16
17 The ALJ erred when he failed to consider whether or not plaintiff's mental
18 impairments hindered his ability to seek out mental health treatment before relying on this
19 factor in support of his failure to credit fully the opinion of an examining doctor. Dr.
20 Peterson specifically indicated that plaintiff reported that he would not have attended his
21 appointment if his father had not made him do so, despite his understanding that it was for
22 his benefit; and Dr. Peterson numerous times indicated that plaintiff was upset due to the
23 social nature of the appointment. According to the Social Security Administration's own
24 rule, "the adjudicator must not draw any inferences about an individual's symptoms and their

1 functional effects from a failure to seek or pursue regular medical treatment without first
2 considering any explanations that the individual may provide, or other information in the
3 case record, that may explain infrequent or irregular medical visits or failure to seek medical
4 treatment.” *See* SSR 96-7, 1996 SSR LEXIS 4, at *21-*22; *see also* *Regennitter v. Comm’r*
5 *SSA*, 166 F.3d 1294, 1296 (9th Cir. 1999) (“Although we have held that ‘an unexplained, or
6 inadequately explained failure to seek treatment can cast doubt on the sincerity of a
7 claimant’s pain testimony,’ we have proscribed the rejection of a claimant’s complaint for
8 lack of treatment when the record establishes that the claimant could not afford it”)
9 (citations, ellipses and brackets omitted).

10 The Court also notes that Dr. Peterson was aware of this fact of no mental health
11 treatment, as he cited it in his diagnoses (*see* Tr. 340). Despite the lack of mental health
12 treatment, Dr. Peterson nevertheless opined that plaintiff suffered from limitations on his
13 ability to work (Tr. 341). The ALJ failed to explain adequately why his interpretation of this
14 evidence was more correct than that of Dr. Peterson. *See Reddick, supra*, 157 F.3d at 725
15 (*citing Embrey*, 849 F.2d at 421-22). Similarly, regarding the ALJ’s reference to the fact that
16 Dr. Peterson opined that mental health treatment would help the plaintiff increase his ability
17 to work, this fact does not comprise a legitimate reason to fail to credit fully Dr. Peterson’s
18 opinion, and the ALJ failed to indicate any evidence supporting the finding.

19 For the reasons stated and based on the relevant record, the Court concludes that the
20 ALJ failed to provide specific and legitimate reasons for his failure to credit fully the
21 opinions of examining doctor, Dr. Peterson. The Court also concludes that the ALJ’s reasons
22 for his failure to credit fully Dr. Peterson’s opinions demonstrate that Dr. Peterson’s opinion
23 was not understood and was not evaluated properly.
24

1 Defendant argues that even if the ALJ erred in his review of the evidence provided by
2 Dr. Peterson, it is harmless error (*see* ECF No. 14, pp. 4-7). However, based on the relevant
3 record, the Court concludes that although the ALJ discussed other medical evidence in his
4 written decision, this discussion does not overcome the error in the ALJ's evaluation of the
5 opinions of Dr. Peterson. Dr. Peterson's opinions were medical opinions specifically
6 regarding plaintiff's ability to work, they were not conclusory opinions that plaintiff was
7 disabled, despite defendant's argument to the contrary. *See* SSR 96-5p, 1006 SSR LEXIS 2
8 at *12-*13; *see also* *Reddick, supra*, 157 F.3d at 725 (*citing* *Magallanes, supra*, 881 F.2d at
9 751).

10 As mentioned previously, in the context of social security appeals, legal errors
11 committed by the ALJ may be considered harmless where the error is irrelevant to the
12 ultimate disability conclusion when considering the record as a whole. *See Molina, supra*,
13 674 F.3d at 1115-16, 1117-19, 11121-22, 2012 U.S. App. LEXIS 6570 at *24-*26, *32-*36,
14 *45-*46; *see also* 28 U.S.C. § 2111; *Shinsheki*, 556 U.S. at 407; *Stout, supra*, 454 F.3d at
15 1054-55.

16 Not only was Dr. Peterson's medical opinion not understood or evaluated properly, in
17 addition, the ALJ's determination regarding plaintiff's residual functional capacity does not
18 reflect that Dr. Peterson's opinion was credited fully (*see* Tr. 17, 336-41). A residual
19 functional capacity assessment by the ALJ "must always consider and address medical
20 source opinions. If the RFC assessment conflicts with an opinion from a medical source, the
21 adjudicator must explain why the opinion was not adopted." SSR 96-8p, 1996 SSR LEXIS 5
22 at *20. Here, the ALJ failed to do so adequately. *See id.*
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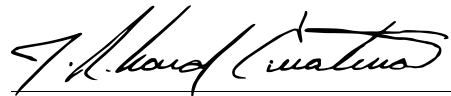
1 Based on the relevant record as a whole, the Court concludes that the ALJ's error is
2 relevant to the determination regarding plaintiff's residual functional capacity; and hence, is
3 relevant to the ultimate disability determination. Therefore, the ALJ's error in his review of
4 the medical opinions from Dr. Peterson is not harmless. *See Molina, supra*, 674 F.3d at 1115-
5 16, 1117-19, 11121-22.

6 CONCLUSION

7 Based on these reasons, and the relevant record, the undersigned recommends that
8 this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
9 405(g) to the Commissioner for further consideration. **JUDGMENT** should be for
10 **PLAINTIFF** and the case should be closed.

11 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
12 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.
13 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of
14 de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time
15 limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on
16 November 30, 2012, as noted in the caption.

17 Dated this 9th day of November, 2012.

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20 J. Richard Creatura
21 United States Magistrate Judge
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